No. 80-1282

Office-Supreme Court
FILED
APR 8 198
ALEXANDER
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT ANTHONY PODESTA,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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April 8, 1981

Pandick Press Midwest, Inc., Chicago • 454-7600

TABLE OF AUTHORITIES

PAGE

Consolidated Edison Co. v. *NLRB,* 305 U. S. 197 (1938) 1

Johnson v. *United States,* 628 F. 2d 187 (D. C. Cir. 1980) 2

Richardson v. *Perales,* 402 U. S. 389 (1971) 2

Treatises

K. Davis, 2 *Administrative Law Treatise,* § 14.10 (1958) 1

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The Commission suggests that in consenting to the admission of excerpts of Michno's investigatory transcripts into evidence rather than having them read into the record by the witness the Petitioner somehow waived or delimited his right to object to the competency of this hearsay evidence. (Mem. 3) Under the so-called residuum rule hearsay alone could not support an agency determination; a residuum of evidence of a type admissible in a jury trial also had to be present. See *Consolidated Edison* v. *NLRB,* 305 U. S. 197, 230 (1938); K. Davis, 2 *Administrative Law Treatise* § 14.10, at 292 (1958).

In *Richardson* v. *Perales,* 402 U. S. 390, 402 (1971), this Court rejected the rationale underlying the residuum rule and held that hearsay may be sufficiently trustworthy to support an agency finding if its "underlying reliability and probative value" can be assured.[1]

Since this Court's decision in *Richardson,* a respondent in an agency proceeding no longer has any basis for objecting to the admissibility of hearsay evidence on the ground that it could not constitute substantial evidence. Concomitantly, the failure to make such an objection does not relieve the agency of its burden of establishing the underlying reliability and probative value of such evidence or the Court of Appeals of its responsibility to "evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility." *Johnson* v. *United States,* 628 F. 2d 187, 190-191 (D. C. Cir. 1980)[2]

The Commission also suggests that Michno's investigatory testimony concerning the circumstances surrounding the initiation and execution of the transactions was not self-contradictory, ambiguous or uncorroborated in any "material"

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[1] In *Richardson,* the Court delineated numerous factors which assured the underlying reliability and probative value of the reports of the licensed physicians and rejected the argument that the petitioner's inability to cross-examine each physician at the hearing diminished the reliability of this evidence on the ground that the "claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician." *Id.* at 402. Unlike the situation in *Richardson,* in the present case the Petitioner was unable to cross-examine the witness concerning the ambiguities and inconsistencies in his investigatory testimony because of a lapse in memory.

[2] In the present case, it is impossible to ascertain from the per curiam opinion of the Court of Appeals the basis upon which it determined that the testimony in the investigatory transcripts was sufficiently reliable and probative that it constitutes substantial evidence. (Pet. App. 1a) In the absence of such a finding by the Court of Appeals, this Court can only speculate as to the rationale of its determination.

respect. (Mem. 3, n.3). There is no other evidence in the record concerning the content of communications between Michno and the Petitioner at the time the transactions were initiated. The self-contradictions in the testimony relate to such matters as the details surrounding the initiation and execution of the transactions, and Michno's prior business relationship with the Petitioner.

When viewed in the context of the undisputed evidence in the record that Michno had engaged in approximately 100 prearranged trades with the other party to these transactions during the month before they were initiated, these ambiguities and contradictions in his investigatory testimony are very material to the issue concerning the legitimacy of the Commission's inference that the Petitioner "orchestrated" these transactions (Pet. App. 5b). The lack of corroborating evidence and the Petitioner's inability to confront and cross-examine Michno concerning these contradictions raises a serious question as to whether the underlying reliability and probative value of this hearsay evidence was sufficiently assured that it could constitute substantial evidence which would support a finding of fraud.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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